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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-444, Missouri v. Frye.
5 General Koster.

6 ORAL ARGUMENT OF CHRIS KOSTER
7 ON BEHALF OF THE PETITIONER

8 MR. KOSTER: Mr. Chief Justice, and may it
9 please the Court:

10 But for counsel's error, defendant would
11 have insisted on going to trial. That is the test for
12 prejudice. But in Mr. Frye's case, that test was not
13 met. The truth is, despite counsel's error, Mr. Frye
14 knowingly waived his right to trial, and solemnly
15 admitted his guilt. Under both Hill and Premo, Mr. Frye
16 has failed to show prejudice, and therefore his guilty
17 plea remains voluntary, intelligent, and final.

18 Mr. Frye may not assert ineffective
19 assistance by alleging that, but for counsel's error, he
20 could have gotten a better deal on an earlier date.
21 That is not the standard. And the court of appeals
22 should be reversed.

23 JUSTICE SOTOMAYOR: Counsel, sometimes one's
24 experience has to be challenged. I for one have never
25 heard of a case in which parties are discussing a plea,

1 except in the most unusual of circumstances, and they
2 advance a court date to enter the plea. In most cases,
3 they just wait until the court date and tell the judge:
4 I'm ready to plead guilty.

5 This is such an unusual case, because the
6 plea happens on day 1. The courts below is assuming
7 that between day 1 and day 5, or 3 or 4, the guy would
8 have come in and pled guilty, would have advanced the
9 later court date?

10 MR. KOSTER: Well, the plea -- the plea
11 occurred on March 3, 2008 --

12 JUSTICE SOTOMAYOR: No, that's the second
13 plea.

14 MR. KOSTER: It went -- right. The plea
15 offer --

16 JUSTICE SOTOMAYOR: I'm talking about the
17 plea --

18 MR. KOSTER: The plea offer expired on
19 December 28, 2007, I believe.

20 JUSTICE SOTOMAYOR: He commits the crime on
21 the 29th or the 30th. He commits a second offense on
22 the 29th or 30th?

23 MR. KOSTER: That actually was the fifth
24 offense, but yes.

25 JUSTICE SOTOMAYOR: All right. My -- my

1 point is, how reasonable could it be for the -- for a
2 court to assume that the plea offer had been made and
3 that he would have taken it before the January court
4 date that was set?

5 MR. KOSTER: It would be less than likely,
6 but not impossible, I would say. And it would depend on
7 a myriad of circumstances, many of which are as -- as --
8 could be just dependent on the defense counsel's own
9 personal schedule.

10 But the scheduling of a plea once -- once an
11 agreement has been made between a prosecutor and a
12 defense counsel, the scheduling of a plea I think is
13 largely a basis of convenience and does not
14 necessarily -- is not necessarily based on the
15 preliminary hearing date or any future schedule date.

16 CHIEF JUSTICE ROBERTS: I suppose the
17 defendant might think, you know, there is really bad
18 evidence out there that they don't have yet. And if
19 I -- I want to nail this deal down as soon as possible.
20 I mean, that would be a reason to -- to move things up
21 and get the plea in early, wouldn't it?

22 MR. KOSTER: It could be. I would say that
23 that is --

24 CHIEF JUSTICE ROBERTS: I mean, I don't know
25 how often that happens.

1 MR. KOSTER: That is possible. Right. But
2 it's also exactly another reason to keep the discretion
3 of offering these plea bargains, and the ability to take
4 these plea bargains back solely in the hands of the
5 prosecutors in the country.

6 JUSTICE ALITO: I am really puzzled by what
7 as a practical matter is at stake in this case. Under
8 the State court decision, the defendant has the option
9 of either pleading guilty to the charge -- in which case
10 he will be right back where he is now -- or he can
11 insist on a trial.

12 If he insists on the trial, you need to
13 prove that he was driving with a revoked license. That
14 seems to me -- if there ever was a slam dunk trial, that
15 seems to me that's the slam dunk trial. You introduce
16 the records of -- showing that his license was revoked,
17 and you have the officer testify that on such and such a
18 date, he was driving. So I -- I don't really see what
19 is involved in this case.

20 MR. KOSTER: The last part of the question
21 is?

22 JUSTICE ALITO: I don't see what is at stake
23 here. I don't see what that -- as a practical matter,
24 this seems to be -- to me a case about nothing.

25 Am I wrong? Am I missing something?

1 MR. KOSTER: As a former -- as a former
2 prosecutor myself, I would agree with this. This
3 gentleman went into court. He had two options before
4 him. There was not a third option. The -- the plea
5 that was -- that left reality on December 28 was not
6 there on March 3. He had a binary choice between two
7 options on March 3. He chose not trial. By choosing
8 not trial, it leaves us without a situation where either
9 Hill or Premo prejudice can be shown.

10 JUSTICE KENNEDY: But we take the case on
11 the assumption that he hadn't heard of the earlier
12 better offer. Am I wrong about that?

13 MR. KOSTER: In this case, the defendant was
14 unaware of the earlier better offer. That is correct.
15 But in this case also, the defendant went out 2 days
16 later and picked up a fifth charge. So one of the
17 considerations that I think has to be left with the
18 Court is that the possibility that this particular
19 defendant was ever going to see this plea offer is
20 almost nil. This was his fifth arrest for driving while
21 revoked.

22 JUSTICE BREYER: I mean, we've got to be --
23 aren't we taking this on -- isn't there an assumption
24 that there is a finding, or some lower court judge made
25 a finding that if he had known about the better deal

1 that was offered, he would have taken it?

2 MR. KOSTER: That -- what is in the record
3 is that he would have taken the 90-day deal on the
4 misdemeanor.

5 JUSTICE BREYER: Yes.

6 MR. KOSTER: But there is also an important
7 element in the record, that when he went in front of the
8 court on March 3 and the felony offer was given to the
9 judge, which was 3 years in deferral on probation plus
10 10 days shock time, the judge in Columbia, Missouri,
11 gave the felony offer the back of his hand.

12 And so while, yes, the record says that --

13 JUSTICE BREYER: So that's a causal problem.
14 You are saying that, even if he had accepted it, it
15 would have gone to the judge, and the judge would have
16 turned it down anyway, the judge wouldn't have accepted
17 it.

18 MR. KOSTER: If the judge --

19 JUSTICE BREYER: Is that your point?

20 MR. KOSTER: Yes, Your Honor.

21 JUSTICE BREYER: Well, then there's a --
22 somebody must have found somewhere that this made a
23 difference, that the failure to tell him about the
24 special offer of the misdemeanor did in fact make a
25 difference because he would have accepted it and he

1 would have ended up with it.

2 MR. KOSTER: Well, and that is the problem
3 that brings us here today. The Missouri Court of
4 Appeals said that --

5 JUSTICE BREYER: Yes.

6 MR. KOSTER: Through a misrepresent -- a
7 misinterpretation, we believe, of the Strickland
8 standard and, more importantly, a misreading of where
9 Hill and Premo takes us. Cert was granted on this case
10 just at the same time that Premo was very clearly
11 re-articulating the Hill standard.

12 And so the court of appeals had gone back
13 towards Strickland with a very broad reading just as
14 this Court was coming down with an opinion that very
15 clearly re-articulated the Hill standard, the two-part
16 performance and prejudice test.

17 And that's what we are asking be reversed.

18 JUSTICE ALITO: Suppose he had snapped up
19 this deal as soon as it was offered. By the time he --
20 he appeared before the court to answer a formal plea of
21 guilty, would the court have known that he had in the
22 interim been arrested yet again for driving without a
23 license?

24 MR. KOSTER: The court probably would have
25 known as a result of a pre-sentence investigation. And

1 perhaps more importantly, Your Honor, the prosecutor
2 himself would have known about the -- the second arrest,
3 and he would have withdrawn it.

4 And if I may, it's not always -- we have
5 concentrated so far in the case before and today on
6 subsequent criminal actions. You know, back home in
7 Missouri, the criminal reporting system, we still use on
8 five- part carbon paper that you have got to press hard
9 with a pen to get down to the fifth page. It is also
10 possible that the prosecutor learns at a subsequent date
11 of a criminal history that is material that predates the
12 plea offer. And so in both directions, it's important
13 that prosecutors have full discretion to take these
14 pleas back.

15 JUSTICE KENNEDY: Well, regardless, your
16 legal position is that there is no basis for setting
17 aside the plea if an earlier, better offer was not
18 communicated.

19 That's your legal position, right?

20 MR. KOSTER: My legal position is that a
21 finding -- a conviction was entered on March 3. He pled
22 guilty. The question before the Court is what satisfies
23 a standard by which we are going to unwind it? A Sixth
24 Amendment violation would satisfy that standard, and if
25 -- if there was a Sixth Amendment violation, if the plea

1 was truly involuntary, we would unwind it.

2 But the search for a better deal that is
3 antecedent to the events of March 3 is not the Sixth
4 Amendment violation that should begin unwinding 97
5 percent of the convictions in the country.

6 JUSTICE KENNEDY: You're saying there's no
7 Sixth Amendment violation when the counsel fails to
8 communicate a favorable offer to the defendant. That's
9 your position.

10 MR. KOSTER: No. Respectfully, Your Honor,
11 that is not my position. My position is that
12 ineffective assistance is a two-part test, that there
13 was a performance breach in the failure to communicate,
14 but once the performance breach is accepted, then it has
15 to be run through the Hill standard to find whether
16 prejudice has occurred, and then we would find the Sixth
17 Amendment breach. But we -- we do not get there
18 logically because the offer did not exist after -- after
19 December 28.

20 JUSTICE SCALIA: Well, I -- I didn't
21 understand that to be your position.

22 There -- there is a statement in your brief
23 that the question is whether plea negotiations that did
24 not result in a guilty plea constitute a critical
25 confrontation that gives the rise to effective

1 assistance of counsel during such negotiations. So I
2 thought your position was that so long as the -- the
3 plea negotiations don't result in a guilty plea,
4 effective assistance of counsel doesn't even come into
5 the equation.

6 MR. KOSTER: I -- there is a question in --

7 JUSTICE SCALIA: I mean, you can say yes or
8 no. I mean, you can retract the question on that, I
9 suppose.

10 MR. KOSTER: Is the question whether I
11 believe that plea negotiations are a critical stage?

12 JUSTICE SCALIA: When they do not result in
13 a guilty plea.

14 MR. KOSTER: I believe they are not -- I
15 believe that plea negotiations are not a critical stage
16 under the laws of this Court.

17 JUSTICE KENNEDY: That's what we took the
18 case for. We didn't -- we wouldn't have taken the case
19 if we were concerned about what happened in March and
20 what happened in February. We took the case because of
21 your position, which is it's not a Sixth Amendment
22 violation in these circumstances.

23 MR. KOSTER: I do not -- there is a factual
24 question as to whether or not plea negotiations in this
25 case really ever engaged when all that ever occurred was

1 the prosecutor sent a letter to the defense attorney.

2 Only in the most technical of readings --

3 JUSTICE SCALIA: Yes, but we don't care
4 about that. What do we care about that? We -- we don't
5 take cases to figure out those -- those picky, picky
6 factual questions. The issue that I thought was
7 important here is whether this is a critical stage
8 when -- when the defendant is not -- does not accept
9 the -- the plea and plead guilty.

10 MR. KOSTER: Plea negotiations I don't
11 believe are a critical stage, because the fate -- in the
12 back and forth between a prosecutor and a defense
13 attorney the fate of the accused is not -- is not set.
14 And these -- of course these negotiations can take place
15 over a very long time. Either party can get up from the
16 table and walk away at any time. And then, perhaps most
17 importantly, the -- the dialogue of the negotiations are
18 not used against the defendant at critical stages, which
19 would contrast it, I suppose, in a Miranda situation in
20 a custodial interrogation where that would be a critical
21 stage.

22 JUSTICE SCALIA: And if it were a critical
23 stage, I suppose that counsel would be ineffective, not
24 only if he was a lousy lawyer and didn't know the law,
25 but if he was a bad negotiator. I mean -- right? Being

1 a good criminal lawyer means you -- you got to be a good
2 horse trader, right?

3 MR. KOSTER: I agree that that would be one
4 of the extensions, if critical stage analysis was
5 applied to plea negotiations.

6 JUSTICE SCALIA: You tell him to turn down a
7 deal that in fact, you know, was a pretty good deal,
8 that would be ineffective assistance of counsel. So you
9 must -- you must know how to handle yourself in a used
10 car lot, right?

11 MR. KOSTER: I understand that that would be
12 one of the ramifications.

13 JUSTICE KAGAN: So Mr. Koster --

14 JUSTICE BREYER: This is on the basic
15 question --

16 JUSTICE KENNEDY: It's -- it's very odd for
17 you to say that -- to me -- that this is not a critical
18 stage. If it results in a guilty plea and the -- and
19 the attorney has not done sufficient research to uncover
20 a defense, it can be set aside then. So it's -- so you
21 are saying it's not a critical stage depending on what
22 the end result is. That's very difficult.

23 I thought we were going to tell attorneys,
24 you have an obligation during this plea bargain process
25 to use professional competence. And you say, well, you

1 do or you don't. That doesn't make much sense.

2 MR. KOSTER: My understanding, Your Honor,
3 is that attorneys are guaranteed the accused at critical
4 stages, such as arraignments, plea hearings, trials, but
5 then there is an implied guarantee that comes with that
6 critical stage, and that implied guarantee is that their
7 -- that the attorney appointed will do research,
8 analysis and preparation that prepares him for the
9 critical stage.

10 But when David Boyce is sitting home on a
11 Saturday night with a file opened in his lap preparing
12 for a case on Monday, that moment is not a critical
13 stage of trial, on a Saturday night in his den, but it
14 prepares for, it is precedent to a critical stage. And
15 the failure to engage in that preparation analysis can
16 lead to performance and prejudice at critical stages,
17 but it itself is not.

18 JUSTICE BREYER: Well, the -- the
19 question -- I make a counter-assumption. The problem
20 that I -- I have a feeling that I would like you and the
21 others to comment on, is that you are worried deeply
22 about a practical problem, and that the practical
23 problem is that it would be too easy, as just was
24 suggested by the question, to find that the lawyer after
25 the defendant is convicted did a bad job during the plea

1 negotiation, in which case everybody will get two or
2 three bites at the apple. And one of the reasons for
3 that is every brief has been lifting the standards,
4 particularly in respect to prejudice, from Hill, which
5 was addressing a different question. It was addressing
6 the question of missed -- bad performance by the lawyer
7 at trial. And that is hard to track what the effects
8 are. It isn't that hard to say the trial was unfair,
9 give him a new one.

10 That won't work here, I don't think. So
11 suppose what we did, instead of saying there was no
12 right, you simply said you have to prove with some
13 certainty, work out a standard, that there really was
14 inadequate assistance during the plea bargaining, and
15 you have to show something more than a reasonable
16 probability that this would have led to the plea, et
17 cetera. You have to show that it would have happened.

18 Or you have a -- in other words, you have
19 two tougher standards for this area, but you don't
20 reject the idea of inadequate assistance of counsel
21 during the plea bargaining stage. I would like people's
22 views insofar as they are willing to give them, on that
23 question.

24 MR. KOSTER: Ineffective assistance of
25 counsel is a -- is a term of art, and it is a two-part

1 test. I believe that there can be performance breaches
2 that occur between -- at the -- at the plea bargaining
3 stage, but that prejudice does not occur until we return
4 to a critical stage, which is -- is when that -- when
5 that plea, when the product of that plea negotiation is
6 returned to a critical stage and then it has critical
7 stage protections over it, where the judge is there and
8 there is an allocution and the rest of the protections
9 --

10 JUSTICE GINSBURG: Well, the open plea that
11 wasn't made, that is a critical stage, that he took a
12 the plea. But he I think has a plausible argument that
13 the plea he made, the open plea with no bargain in the
14 picture, that that plea was not intelligently made
15 because he didn't know that there had been an offer for
16 him to plead to a misdemeanor rather than a felony.

17 MR. KOSTER: In Tollett -- may I?

18 JUSTICE GINSBURG: Yes.

19 MR. KOSTER: In Tollett v. Henderson the
20 question of the defendant Mr. Henderson's knowing waiver
21 in that case, where the breach was infinitely more
22 egregious in my view, which was the 1948 court packing
23 that occurred and the African Americans citizens were
24 excluded from that grand jury pool.

25 Mr. Henderson's lack of knowledge about a

1 previous constitutional deprivation was not -- did not
2 make his waiver unknowing. Same with the analysis in
3 McMann and in Parker and in Brady. To -- to say --
4 there is no limiting principle that will allow this
5 omission to unwind the knowing quality of Mr. Frye's
6 waiver and then not open up the floodgates to all sorts
7 of pre-constitutional deprivations.

8 I would like to reserve the balance of my
9 time, Your Honor, thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
11 Mr. Yang.

12 ORAL ARGUMENT OF ANTHONY A. YANG

13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE PETITIONER

15 MR. YANG: Mr. Chief Justice, and may it
16 please the Court:

17 When a defendant pleads guilty --

18 JUSTICE SOTOMAYOR: Are you taking the same
19 position your -- I don't want to call it co-counsel --
20 Petitioner's counsel is taking, that you are not
21 entitled to an attorney at plea bargaining, unless you
22 waive your -- unless your right to a trial?

23 MR. YANG: No, we are not --

24 JUSTICE SOTOMAYOR: It's not a --

25 MR. YANG: We are not taking the view. In

1 this case the alleged deficiency is really not an
2 interaction between the prosecution and the defense
3 counsel in plea bargaining. The alleged deficiency is a
4 failure to inform the defendant of things the defendant
5 would want to know as going forward, and we're -- we are
6 willing to assume the defendant has a right to be
7 properly informed by counsel. But with any Strickland
8 claim the relevant inquiry is whether or not the
9 defendant has shown cognizable prejudice as a result of
10 a deficient performance by the counsel.

11 And when a defendant pleads guilty in open
12 court, the conviction rests on the defendant's
13 assertion, an admission of his own guilt, and his
14 consent that there be judgment entered, a judgment of
15 conviction, entered without trial.

16 And because the conviction rests on a
17 consent judgment, it wipes free antecedent
18 constitutional errors. The one challenge that --

19 JUSTICE KAGAN: So I think, Mr. Yang, what
20 Justice Sotomayor was suggesting is that your position
21 does in fact require you to say that if there were no
22 counsel at all in the proceedings, that would be
23 perfectly -- that -- you know, there would not be a
24 constitutional problem with that. Once he pleads
25 guilty, it just wipes away the fact that no counsel has

1 been appointed for him.

2 MR. YANG: A -- a guilty plea wipes free all
3 kinds of constitutional violations.

4 JUSTICE SCALIA: No, but the -- the guilty
5 -- I mean, no, the reason why that is not true is that
6 the guilty plea must be entered with advice of counsel.
7 You acknowledge that, don't you?

8 MR. YANG: Correct. And the guilty plea --

9 JUSTICE SCALIA: So the guilty plea doesn't
10 erase everything if it has been entered without advice
11 of counsel.

12 MR. YANG: Correct. When the counseled
13 guilty plea is entered, this Court has held that the one
14 remaining challenge that would be allowed is the
15 challenge to the knowing and intelligent waiver of the
16 right to trial, which is what the guilty plea is. Now,
17 in order to show that you are prejudiced --

18 JUSTICE KAGAN: So does that mean, Mr. Yang,
19 a State could set up a system where it says we are going
20 to do all our negotiating with the defendant with no
21 counsel present in the room, but we are going to keep a
22 lawyer on board just in the courtroom to advise him
23 whether he should plead -- to advise him about the plea
24 that he struck, even though he struck this plea with no
25 counsel in the room, and that would be perfectly okay?

1 MR. YANG: We are not saying that -- that --

2 JUSTICE KAGAN: All the negotiations could
3 be uncounseled.

4 MR. YANG: We are not taking the position
5 that States can deprive counsel or deprive counsel from
6 participation in the guilty plea process. But what we
7 are saying --

8 JUSTICE KAGAN: Well, I don't understand how
9 you can say that, if you -- you know -- you are saying
10 that; because you're saying that in the end the guilty
11 plea wipes all constitutional error away.

12 MR. YANG: Just as we are not saying that
13 there can be coerced confessions, not just like we are
14 saying that a statute can impermissibly burden the right
15 to trial by putting a death sentence on -- that's
16 available only when you go to trial. We are not saying
17 any of that is allowed. But what we are saying is
18 when a -- and that was the Brady trilogy, Brady and
19 McMann and ultimate Tollett, which led to Hill.

20 What the Court recognized is when you plead
21 guilty in open court you are waiving your right to
22 trial. And the relevant inquiry, the only inquire once
23 the defendant has admitted guilt, is to determine
24 whether or not the waiver of the trial rights were
25 knowing and voluntary. And the reason that that is a

1 relevant inquiry is because you have a constitutional
2 right to trial. And due process requires that the
3 waiver of those trial rights be knowing, intelligent and
4 voluntary. And in Hill, the Court confronted the
5 question and said: You need to show deficient advice in
6 the context of pleading guilty; and in addition, you had
7 need to show that that prejudiced you because, absent --
8 if you had received proper advice, you would have
9 actually not waived your right to trial; you would have
10 asserted your right to trial and gone to trial. That's
11 the standard that applies.

12 JUSTICE KENNEDY: If defense counsel gives
13 wrong information to the defendant about witnesses that
14 can testify in his behalf, and so forth, very bad legal
15 advice, that can be grounds for setting aside the plea,
16 correct?

17 MR. YANG: It can, and because what's
18 relevant --

19 JUSTICE KENNEDY: All right, so -- and that
20 is because counsel pre the entry of the plea did not
21 adequately advise his client.

22 MR. YANG: Right, right. The key is that --

23 JUSTICE KENNEDY: Why is there no problem
24 when he doesn't adequately advise a client of earlier
25 better offers?

1 MR. YANG: It's a different prejudice. The
2 -- when you plead guilty and your counsel has advised
3 you wrongly in a way that would have changed your mind
4 about the merits of going forward on trial, you can show
5 that the waiver of the trial right is something that was
6 prejudiced. But because -- had you known, had you been
7 properly advised, you would have exercised the whole
8 panoply of rights that the Constitution provides one who
9 goes to trial, not only a right to a trial by jury but
10 all the trial rights that go with it.

11 But when you instead plead guilty in open
12 court -- and the claim here is not that the defendant
13 would have exercised his right to trial. The claim is
14 he would have waived his right to trial either way.
15 That is not prejudice to the -- that would overcome the
16 guilty plea, which again rests on --

17 JUSTICE KAGAN: Well, Mr. Yang, there are
18 different kinds of unfairness. One kind of unfairness
19 is when you are badly advised and you, therefore, waived
20 your right to trial and you would have gone. But there
21 is another prejudice, which is you and ten other guys
22 are all in the same situation and those ten other guys
23 come up with a favorable plea deal because their lawyers
24 are paying attention, and you come up with an
25 unfavorable plea deal because your lawyer has fallen

1 asleep. And to the extent that we have an effective
2 assistance right that means something, that unfairness
3 needs to be addressed by it, doesn't it?

4 MR. YANG: Well, when -- again, once --
5 whether or not there was a prior error, once you plead
6 guilty, the question is not whether there were other
7 deals on the table, the question is whether that waiver
8 of --

9 JUSTICE KAGAN: Well, I guess that is the
10 question. Why isn't that the question?

11 MR. YANG: Well, right, but if it were the
12 question, it would call into -- this Court in, in going
13 back to Brady and then in Boykin, explained that
14 what's -- the relevant question when you enter a guilty
15 plea is whether you have waived your right to trial
16 validly. And, in fact, that has to be spread upon the
17 record. Rule 11(b) has now been modified by this Court
18 to go through the things you have to check to make sure
19 that that waiver of your trial rights are knowing and
20 voluntary.

21 What we have here is not anything associated
22 with the waiver of trial rights. What really the
23 defendant is claiming is some entitlement be able to
24 take another deal that would not have resulted in trial.
25 But that is not relevant to the waiver of trial rights.

1 That would be recognizing another type of right. But
2 this Court has repeatedly held that there is no right to
3 a guilty plea, there is no right to plea bargaining,
4 once you have a plea agreement there is no right to
5 enforcement. The only rights that come into play is
6 when that guilty plea is rendered into a judgment. And
7 when you don't get there, but instead you plead guilty
8 and you have waived your right to trial, you have
9 consented to the entry of judgment, and even if you had
10 received better advice you would have consented to
11 the -- you would not have gone forward to trial, you
12 have -- the basis on which the conviction rests remains
13 valid.

14 JUSTICE SCALIA: You have admitted that you
15 got what you deserved, right?

16 MR. YANG: Precisely. And this Court in
17 Premo addressed the exact same question. In Premo there
18 was a contention that had counsel done better before by
19 filing a motion to suppress, it would have been in a
20 better position to secure a better plea agreement from
21 the prosecution. But the Court concluded that, no; the
22 relevant inquiry once you have pled guilty is whether or
23 not you would have, if properly advised, insisted on
24 your trial rights and gone to trial. That's the
25 standard set forth in Hill. And the reason --

1 JUSTICE GINSBURG: Mr. Yang, in your view is
2 there any situation in which a defendant could regain a
3 plea opportunity that he lost due to counsel's conceded
4 inadequacy? And I think it is accepted that not telling
5 him of the plea offer was ineffective representation.
6 Is there any case where the defendant could regain the
7 plea opportunity that he lost?

8 MR. YANG: If he pleads guilty?

9 JUSTICE GINSBURG: Yes, if he doesn't seek
10 the trial right.

11 MR. YANG: I'm sorry, I didn't catch that.

12 JUSTICE GINSBURG: Yes. If he doesn't want
13 to go to trial and he is going to plead guilty, is there
14 any circumstance where he could regain that lost
15 opportunity?

16 MR. YANG: If he has pleaded guilty and he
17 validly waived his rights to trial, because he would not
18 have asserted them, then I think under Hill what you
19 have is a defendant who admits guilt, there is no real
20 risk of any kind of error in that determination, and the
21 judgment which must be set aside -- remember, we have to
22 set aside the judgment. The judgment rests on the
23 admission of guilt and the waiver of trial. The
24 judgment cannot be set aside at that point, because this
25 Court has long recognized the special force of finality

1 with respect to guilty pleas. That is because for
2 several reasons.

3 First, guilty pleas are an important part of
4 the system, and it would be -- both delay and impair the
5 orderly administration of justice any time we open
6 another avenue to challenge guilty pleas. But, two,
7 once the defendant has stood up in open court and
8 admitted guilt, there is almost no risk of error, and
9 the defendant has gotten the proper sentence and the
10 proper conviction.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. YANG. Thank you.

13 CHIEF JUSTICE ROBERTS. Mr. Queener.

14 ORAL ARGUMENT OF EMMETT D. QUEENER

15 ON BEHALF OF THE RESPONDENT

16 MR. QUEENER: Mr. Chief Justice and may it
17 please the Court:

18 Galin Frye entered a plea of guilty to
19 felony driving while revoked and was sentenced to 3
20 years in prison. His trial lawyer failed to inform him
21 that the prosecutor was willing to allow him to accept a
22 plea offer to a misdemeanor charge and recommend 90 days
23 in jail. Fundamental fairness and reliability of
24 criminal process requires that an attorney provide his
25 client information regarding matters in this case.

1 JUSTICE SCALIA: Why? Why is it unfair for
2 the law to apply to this individual the punishment he
3 deserved for the crime that he committed? I mean, the
4 object of the system is to put -- is to punish people
5 who commit crimes in a certain degree.

6 And here he admitted he did the crime and he
7 got the degree of punishment that the law provides.
8 What could be more fair than that?

9 MR. QUEENER: Fairness includes a whole
10 range of sentencing options, and in this case the
11 prosecutor was making a determination of what was fair
12 in this case when he made the offer.

13 JUSTICE SCALIA: Ex ante, I suppose you
14 could say that. But when you look at it later, it's
15 clear that that would have been unfair. In fact, this
16 individual was perfectly willing to admit that he had
17 been guilty of more than what the prosecutor had
18 offered.

19 MR. QUEENER: Part of the consideration that
20 a defendant has to make during the plea bargaining
21 process or plea negotiation process is determining the
22 liability that he's willing to accept in entering a plea
23 of guilty.

24 JUSTICE SCALIA: That's true, and he did
25 that when he entered the plea of guilty. You do not

1 contest he was well advised when he entered that plea
2 that it was knowledgeable and he admitted that that's
3 what he had done and was willing to accept the degree of
4 punishment prescribed by law.

5 MR. QUEENER: Well, he was -- the guilty
6 plea in terms of what he was admitting to, he was
7 willing to and had to agree that he had committed the
8 crime of driving while -- while revoked. But the plea
9 was open in terms of sentencing and he was allowed to
10 argue for something lower than sentencing. He only knew
11 that was the available options at that time.

12 He wasn't aware that the prosecutor had made
13 available an option to him to limit his exposure for
14 that offense to 90 days.

15 JUSTICE SOTOMAYOR: Counsel, I have a
16 two-part question.

17 MR. QUEENER: Okay.

18 JUSTICE SOTOMAYOR: All right. What exactly
19 made his plea unknowing or involuntary, number one?

20 And number two, identify the right he was
21 deprived of, substantive or procedural, by his
22 attorney's failure to communicate the plea.

23 MR. QUEENER: The plea was unknowing and
24 involuntary because he was not made aware by his
25 counsel's unprofessional representation of all of the

1 circumstances available to him, the consequences of
2 entering that guilty plea, that would have included the
3 90-day on a misdemeanor if he had been aware of that.

4 JUSTICE ALITO: Suppose he had been told
5 that -- suppose he had been told that, and the
6 prosecutor said, well, yes, that's true. I made that
7 offer, but it's off the table now. And apparently, this
8 was then off the table. So what good would it have done
9 him to know about something that happened in the past
10 but was no longer available.

11 MR. QUEENER: This offer was only no longer
12 on the table at the time he entered the plea of guilty,
13 because it had expired. And that was a result of
14 counsel's ineffectiveness in failing to communicate that
15 to him. The lower court, the Court of Appeals, made a
16 finding that this offer was available, and he could have
17 taken advantage of it before it expired. And that was a
18 finding by the court below.

19 JUSTICE ALITO: I understand that. It may
20 have been unfair, but I don't see why it's involuntary.
21 Because I don't see that -- advising him that he had an
22 option at some point in the past which was no longer
23 available really doesn't have much of a -- doesn't have
24 any bearing on the voluntariness of his plea to a later
25 less-favorable offer.

1 MR. QUEENER: I -- that's -- it seems to me
2 that that's involuntary in the sense that he didn't know
3 it then. It's not that it's involuntary now because
4 that he knows it. It was involuntary because he didn't
5 know it then.

6 JUSTICE KENNEDY: Well, suppose -- suppose
7 the case in which a plea offer's made, not communicated,
8 and expires. And then there is a guilty plea here. And
9 he doesn't -- and the defendant enters a -- a guilty
10 plea but doesn't know about the prior offer. Is -- is
11 there injury?

12 MR. QUEENER: There is -- there is an
13 increase in sentence. And that's the situation here.

14 JUSTICE KENNEDY: Is -- is the plea
15 involuntary? Pardon me, is it unknowing?

16 MR. QUEENER: It is --

17 JUSTICE KENNEDY: And what would he -- what
18 would he have done had he known?

19 MR. QUEENER: It's unknowing in the sense
20 that he did not know the --

21 JUSTICE KENNEDY: You mean, judge, I'm
22 really sorry I didn't accept responsibility three months
23 earlier?

24 MR. QUEENER: What he does -- what's
25 unknowing about that is the potential consequence that

1 he is choosing in deciding to plead guilty. And if I
2 may, that's the second part of your question. The right
3 that he has is the right to make fundamental
4 decisions -- in his case, one of which is to accept a
5 plea bargain and plead guilty.

6 JUSTICE SCALIA: Doesn't -- doesn't the rule
7 that the plea offer may be withdrawn at any time by the
8 prosecutor -- indeed even after it has been accepted --
9 doesn't that well enough establish that there is no
10 right to profit from that plea offer, that there is no
11 constitutional right he's being deprived of, given that
12 the prosecutor can withdraw it even after he accepts it?

13 MR. QUEENER: That can be with -- excuse
14 me -- that can be withdrawn at any time by the
15 prosecutor, but we're not arguing that there is a right
16 to a particular plea -- a particular plea. He is
17 entitled to the right to make a knowing and voluntary
18 acceptance of a plea, a knowing and voluntary guilty
19 plea, and that requires that he know all of the
20 information. And the record that we have in this case,
21 there is nothing to suggest that that plea would not
22 have gone forward. The mere potentiality for
23 withdrawing the plea --

24 JUSTICE SCALIA: I -- I had hoped you were
25 making some argument other than the knowing argument,

1 because as prior discussion has shown, even if he had
2 known, it would have made no difference to whether he
3 had accepted the later plea.

4 Suppose he had been told, "by the way, there
5 was an earlier plea. It's too late to accept it now.
6 Do you want to take this plea?" He says, "oh, I'd like
7 the earlier plea." "I'm sorry, the earlier plea is
8 gone. Do you want this plea or not." He would have
9 taken it.

10 What does the knowledge of the earlier
11 lapsed plea have to do with whether his guilty plea is
12 knowing and voluntary? It doesn't seem to me to have
13 anything to do with that. So I -- I thought you had
14 some other argument that was somehow a right to profit
15 from the earlier offer. And I find it hard to see that
16 right, given that the prosecutor can withdraw the offer
17 and indeed even withdraw it after it's accepted.

18 MR. QUEENER: The right is to enter that
19 plea knowing the full consequences of what he's doing at
20 that point, which includes the limitation on his
21 exposure for the offense. This is sort of a sentencing
22 issue. And an increase in sentence is a -- is
23 prejudicial.

24 JUSTICE GINSBURG: But the -- the Missouri
25 Supreme Court said in what -- that the prosecutor -- it

1 would not -- it would not order the prosecutor to renew
2 that earlier plea. So they said the options were, you
3 can get a new trial -- you can get a trial or you can
4 replead the open plea. But wasn't it -- didn't the
5 Court say we will not order the prosecutor to reinstate
6 the earlier offer?

7 MR. QUEENER: That is correct, Your Honor.

8 Their finding more specifically I think was
9 that they did not feel like they were empowered to do
10 so. We certainly believe that they can -- they are
11 empowered to do so in the sense that this is a remedy
12 provided for a constitutional violation.

13 JUSTICE BREYER: What about as a
14 constitutional violation that, in a context of a world
15 where 95 percent of all people in prison are there as a
16 result of bargaining and guilty pleas arranged with
17 prosecutors, in that context, it's fundamentally unfair
18 to deprive a person of his liberty for 40 years instead
19 of six months because the lawyer which he is guaranteed
20 fell down on the basic, fundamental, obvious duty of
21 communicating the relevant plea agreement?

22 MR. QUEENER: I agree with you completely,
23 Your Honor.

24 JUSTICE BREYER: So is there any support for
25 me?

1 (Laughter.)

2 MR. QUEENER: That -- that is the issue
3 where -- in terms of the sentencing outcome, this is
4 knowledge that he is required to -- that is required by
5 his attorney to provide him -- sentencing of difference
6 is prejudicial under Strickland, and the remedy for -- I
7 guess going back in -- even more basic than that -- is
8 that ineffective assistance of counsel is -- has to be
9 remedied.

10 JUSTICE SCALIA: But if that's ineffective
11 assistance of counsel, surely it's ineffective
12 assistance of counsel to advise him to turn down an
13 offer that he should have snapped up. Isn't that
14 ineffective assistance as well? If it's absolutely
15 clear that this was a great deal, and the lawyer said,
16 "nah, you shouldn't take it."

17 Is that ineffective assistance or not?

18 MR. QUEENER: I'm going to have to couch
19 that in terms of saying it would depend on the
20 circumstances -- what you have to --

21 JUSTICE SCALIA: I gave you the
22 circumstances. It's clearly a super deal. Any good
23 lawyer would have told him to take it. And this lawyer
24 says "don't take it."

25 Is that ineffective assistance?

1 MR. QUEENER: That would probably not be
2 ineffective assistance.

3 JUSTICE SCALIA: It would not be?

4 MR. QUEENER: The question would then be
5 whether or not there is prejudice from that.

6 JUSTICE SCALIA: It would be ineffective
7 assistance and the question would be prejudiced. Is
8 that it?

9 MR. QUEENER: I think an attorney can
10 provide reasonable representation in making that sort of
11 an offer.

12 JUSTICE SCALIA: Give me -- give me a yes or
13 no to the question whether, if every reasonable lawyer
14 would have told him to snap up this offer but his
15 counsel tells him, no, turn it down.

16 Yes or no, is that ineffective assistance?

17 MR. QUEENER: In that circumstance, it is
18 ineffective assistance, because he has to do what is --
19 is a reasonable standard of representation.

20 JUSTICE SCALIA: Then we are in the soup.
21 Then we are in the soup. Because every one of these
22 pleas is subject to the contention that oh, there was an
23 earlier plea, or I should have -- I should have taken it
24 but -- I mean -- and I suppose that if he goes to trial,
25 then you -- you would also say that trial should not

1 have occurred because it was the ineffective assistance
2 of counsel that caused him to turn down the plea. And
3 therefore, we are going to -- right, retry, set aside
4 the trial?

5 MR. QUEENER: Under that circumstance, that
6 would -- may well be.

7 JUSTICE SCALIA: Yes.

8 JUSTICE BREYER: Now, you have read these
9 cases, and now we are right on what I think is the
10 point, because we've both defined a possible
11 constitutional right but there is a practical problem.
12 All right? Now, the States and others have dealt with
13 this on your side for the last 30 years -- and
14 presumably you but not me. I've read a lot more cases.

15 Now, have they developed -- as you look
16 across those cases, are there some States or places that
17 have developed reasonably tough standards in respect to
18 what counts as ineffective assistance, and in respect to
19 whether it made a difference that would help to
20 alleviate the concern that this would turn into a great
21 mess? Which it hasn't, apparently.

22 MR. QUEENER: As I understand these cases,
23 the -- the standards being applied are the Strickland
24 standard. It's the high bar of deficient performance
25 and prejudice under Strickland. And --

1 CHIEF JUSTICE ROBERTS: Well, we get a lot
2 of Strickland cases, and the lower courts do, too.
3 That's not much comfort in terms of what the
4 consequences of a decision in your favor would be.

5 MR. QUEENER: I mean, that -- that's
6 certainly true. I mean, we -- we have --

7 JUSTICE ALITO: Where the case goes to trial
8 prejudice isn't going to be very hard to prove. The
9 person turned down the 5-year deal and gets -- and after
10 trial is sentenced to 20 years. So you've got -- you're
11 got prejudice right there, right?

12 MR. QUEENER: Right.

13 JUSTICE ALITO: So there's always going to
14 be a very good argument for prejudice where a person
15 turns down a favorable deal and then gets slammed after
16 a trial.

17 MR. QUEENER: I'm -- I'm going to qualify my
18 answer a little bit. Because I think we're -- what the
19 Court has to -- to keep in mind is the rational decision
20 requirement that I think was reiterated in -- in
21 Padilla. You're going to have to look at whether or not
22 the defendant was making a rational decision -- in that
23 choice. It's not simply that there was many another
24 offer out there, but was the decision rational on the
25 part of the defendant to accept or reject that offer

1 that was there?

2 CHIEF JUSTICE ROBERTS: Counsel --

3 JUSTICE ALITO: The point is just -- I'm
4 sorry.

5 CHIEF JUSTICE ROBERTS: No, go ahead.

6 JUSTICE ALITO: The point is just that
7 prejudice isn't going to be very tough to show, is it?
8 You turned down a 1-year deal and later when that was
9 off the table, you accepted a 5-year deal.

10 MR. QUEENER: That may well be the --

11 JUSTICE ALITO: That's prejudice.

12 MR. QUEENER: That may well be the easier
13 part of the -- of the equation. But there's still going
14 to be --

15 JUSTICE BREYER: Why? Because you have to
16 show a causal connection, so you would have to show --
17 show in the causal connection that he would have taken
18 that deal.

19 MR. QUEENER: That's -- yes.

20 JUSTICE BREYER: And if -- if you are going
21 to use the words reasonable probability that he would
22 have taken it, it might be fairly easy to show. And
23 that's where in the back of my mind I'm thinking that
24 maybe we want something tougher than reasonable
25 probability, that you have to show that it really would

1 have made a difference.

2 MR. QUEENER: I -- I think reasonable
3 probability is a -- is a workable standard that we have
4 used for -- for many years.

5 JUSTICE GINSBURG: But you are -- you are
6 leaving out of the picture the prosecutor's prerogative
7 to withdraw or flip. You said that the court, that it
8 lacked authority to order the State to offer any
9 bargain, but also the court said, I'm not going to
10 require the prosecutor to renew an earlier offer.

11 One thing is clear in this case; the
12 prosecutor did nothing wrong. The wrong was on the part
13 of defense counsel. So why should the judge disarm the
14 prosecutor, take away the prosecutor's right to change
15 his mind?

16 MR. QUEENER: The -- this is a remedy for
17 the Sixth Amendment violation, and that is to put the
18 defendant back into the position as nearly as possible
19 as he would have been in at the time; and at the time
20 the offer was open -- this is not a situation where the
21 prosecutor is being ordered initially or the first
22 instance to make an offer; it -- this is being viewed as
23 the offer that was originally made is still available
24 and open to the defendant.

25 JUSTICE SCALIA: Yes, but at the time that

1 offer could have been withdrawn by the prosecutor. And
2 you are saying now it can't be withdrawn. So you are
3 really not putting him back in the situation he was in.

4 MR. QUEENER: There -- there is never going
5 to be a perfect remedy for any of these violations, I
6 don't believe.

7 JUSTICE SCALIA: I think that's right.

8 MR. QUEENER: Right.

9 JUSTICE SCALIA: And that's one of the
10 things that causes us to be suspicious of whether there
11 is a constitutional violation --

12 MR. QUEENER: Well --

13 JUSTICE SCALIA: -- because there really
14 isn't any perfect remedy.

15 MR. QUEENER: There can be a perfect --

16 JUSTICE SCALIA: In some cases not even a
17 close to perfect remedy.

18 MR. QUEENER: I think this is close to
19 perfect, as close to perfect as we can get, which is
20 what is required for Sixth Amendment remedies, that it
21 mitigated to the extent possible. And in those
22 circumstances where one party, the interests of one
23 party may be infringed upon, if that happens -- they
24 can't be infringed upon unnecessarily. This is a
25 necessary infringement. The State bears the burden of

1 ineffective assistance of counsel, and if that's in a --
2 an erroneous sentencing then the State has to bear the
3 burden of erroneous sentencing.

4 CHIEF JUSTICE ROBERTS: Counsel --

5 JUSTICE ALITO: On the issue of --

6 CHIEF JUSTICE ROBERTS: I'll go this time.
7 Counsel, on page 24 of your brief you quote Alford for
8 the proposition that a valid plea must be a voluntary
9 and intelligent choice among the alternative courses of
10 action open to the defendant.

11 MR. QUEENER: Yes.

12 CHIEF JUSTICE ROBERTS: On the next page you
13 say when Frye entered his guilty plea before the trial
14 court he was completely unaware that counsel's
15 ineffective delay had forever foreclosed those options.

16 Now, I put the two of those together and
17 find you saying that this was a valid plea.

18 MR. QUEENER: No it was --

19 CHIEF JUSTICE ROBERTS: The question of
20 validity is whether it's an intelligent choice, as you
21 quote, among the alternative choices of action open to
22 the defendant. The next page you say these options have
23 forever been foreclosed, so they weren't open to the
24 defendant.

25 MR. QUEENER: Well those were foreclosed

1 simply as a result of trial counsel's ineffectiveness,
2 which --which caused him to be unaware that they had
3 been ever available to him. So that that's how the plea
4 becomes involuntary is not that he's not aware of what
5 the situation is at the time that he's entering the
6 plea, because there are many other circumstances that
7 goes into his decision of whether or not to enter a
8 plea. Those alternatives were only no longer available
9 to him as a result of counsel's failure to perform his
10 duty professionally and communicate the offer.

11 JUSTICE ALITO: On the issue of remedy, as
12 the Respondent are you not limited to the remedies that
13 were provided in the judgment of the State court?

14 MR. QUEENER: No, I don't believe so,
15 because the State court of -- court of appeals simply
16 thought it was not empowered to put him back in the
17 position that he was in, and I think that is the remedy
18 under the Sixth Amendment.

19 JUSTICE ALITO: You didn't file a cross
20 petition and there wasn't one granted. So aren't --
21 aren't you limited to defending the judgment below? Can
22 you ask for a modification of the judgment below in your
23 favor?

24 MR. QUEENER: The second point in the -- in
25 this case is what is the appropriate remedy.

1 JUSTICE GINSBURG: And that's -- is that the
2 question that the Court raised?

3 MR. QUEENER: Yes, yes.

4 JUSTICE GINSBURG: The Court was expecting
5 you to address.

6 MR. QUEENER: But we did file the petition
7 challenging the -- the finding of the -- or the relief
8 provided by the court below.

9 JUSTICE ALITO: You think that because we
10 added a question that acts as the functional equivalent
11 of a granted cross petition, that would permit
12 modification of the judgment in your favor?

13 MR. QUEENER: No, but the last I -- the last
14 I recall that cert petition was still pending, I may be
15 wrong about that, I'm not sure, that it was just into
16 this case.

17 JUSTICE GINSBURG: Are -- are you
18 recognizing that the remedy that the Missouri Supreme
19 Court did give was a futile remedy, that is, plead
20 guilty, to have another open plea or trial, because this
21 defendant apparently doesn't want to go to trial.

22 MR. QUEENER: I think both of those are
23 futile remedies, and -- and that's why it's really
24 obvious that the remedy has to be something else. This
25 is not a situation where he does have a very like -- a

1 very good likelihood of succeeding at trial. That's not
2 going to do any good. That won't get him a misdemeanor
3 where he will be sentenced to 90 days. The open plea is
4 basically the same -- the very same think that's causing
5 him the prejudice in this case, so the remedy being
6 provided by Missouri Court of Appeals is essentially no
7 remedy at all for the prejudice that he suffered.

8 JUSTICE GINSBURG: But why should -- now
9 that we know what the judge's sentence was, and part of
10 the plea offer was remade, the part about -- what was
11 it, 3 years versus 10 days in jail?

12 MR. QUEENER: Yes.

13 JUSTICE GINSBURG: And the judge said, I'm
14 not going to give him just 10 days, I'm willing to put
15 him in jail for the whole 3 years. Now if that -- this
16 the sentence that the judge gave, he rejected the --
17 half of the plea bargain, so surely he would have
18 rejected the more generous one.

19 MR. QUEENER: I -- I'm not sure that's
20 entirely the only answer we can draw from this record.
21 At the time that this -- or this guilty plea was being
22 entered and the sentence was handed down, this was an
23 open plea, it was not an agreement. If they had gone to
24 court on a plea agreement between the prosecutor and the
25 defense, and that was up for a -- an amendment down to a

1 misdemeanor and a reduced charge; you know, that is
2 something more definitive. Then the judge would be
3 looking at what the parties had agreed to at that point.

4 JUSTICE SCALIA: I'm not sure I understand
5 the difference between an open plea and a plea
6 agreement. He just comes to the judge and says I'm
7 willing to plead to this without the prosecution having
8 offered it?

9 MR. QUEENER: The open plea basically means
10 there is not an agreement between the parties. Now they
11 may each know what either party is going to argue for or
12 recommend, but there is not an agreement between the
13 parties.

14 JUSTICE SCALIA: Okay.

15 MR. QUEENER: And I think that -- would
16 leave the court with a little more flexibility than --
17 than he might otherwise exercise if they came to him
18 with an agreement.

19 JUSTICE SOTOMAYOR: I'm sorry, just to make
20 sure. I thought the earlier, the November 15th letter
21 agreement --

22 MR. QUEENER: Yes.

23 JUSTICE SOTOMAYOR: -- always left it up to
24 the judge whether to accept either the felony with shock
25 treatment or misdemeanor with 90 days. So the judge was

1 always free to reject either of those two?

2 MR. QUEENER: I think the deference to the
3 trial court on probation was in that first one, the
4 three years with defer to the Court on probation. If
5 they had agreed on the 90 days in the misdemeanor, that
6 would have been a plea agreement between the two
7 parties. That would have been a definitive --

8 JUSTICE SCALIA: Well, he could still --

9 JUSTICE SOTOMAYOR: Binding the judge?

10 JUSTICE SCALIA: He could --

11 MR. QUEENER: Not binding the judge. No,
12 that would not bind the judge. It never would. The
13 judge would have the opportunity, at that point -- the
14 only time -- the only thing the judge would have
15 discretion over at that point would be the actual amount
16 of sentence. If the prosecutor reduced that from a
17 felony to a misdemeanor, the judge couldn't reject that.

18 JUSTICE SOTOMAYOR: He would have had to
19 accept it.

20 MR. QUEENER: He would have had to accept --

21 JUSTICE SOTOMAYOR: But he would not have
22 had to accept the 90 days.

23 MR. QUEENER: He would not have had to
24 accept the 90 days.

25 JUSTICE SCALIA: But -- but you're --

1 JUSTICE SOTOMAYOR: I'm sorry. What proof
2 would you have in the record that the judge would have
3 accepted the 90 days?

4 MR. QUEENER: I don't have proof in the
5 record that he would have. What I have in the record --
6 there is nothing in the record to suggest that that
7 would not have happened. The appellate court found --
8 in fact by making the determination that Mr. Frye was
9 prejudiced, necessarily made the conclusion that that
10 plea would have gone forward. The motion court said
11 nothing to refute that. There was nothing in the
12 court's findings that the court would not have accepted
13 that agreement had the parties come before it with that.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 General Koster, you have two minutes remaining. General
17 Koster.

18 REBUTTAL ARGUMENT OF CHRIS KOSTER

19 ON BEHALF OF THE PETITIONER

20 MR. KOSTER: Thank you, Your Honor. Two of
21 the justices questions raise the concept of sentencing
22 equivalency. And certainly sentencing equivalency is an
23 important goal, both at the federal system and we've
24 tried at the state system. But sentencing equivalency
25 is not an avenue that the Sixth Amendment is intending

1 to reach. The essential question here to
2 Justice Breyer's earlier question that I think I didn't
3 answer properly, is should we begin unwinding these
4 convictions in search of lost plea opportunities?

5 I think that we should not. It undermines
6 the long discussions in both Hill and Premo about the
7 importance of the finality of these, and our being able
8 to rely on the finality of these decisions. There is
9 mutual reliance, there's state reliance as well, because
10 when these offers are made the state does not interview
11 witnesses, the state does not send evidence to the lab,
12 the state does not, you know -- sometimes even get to
13 the point where the charges are made. So there is state
14 reliance, which is synonymous with a reliance of justice
15 on the finality of these agreements as well.

16 And also, the search for these lost
17 opportunities that Mr. Frye is asking this court to lead
18 us towards, takes a point of representation beyond the
19 limited scope of the Sixth Amendment in Gonzalez v --
20 Gonzalez-Lopez and other courts, the limited -- the
21 limitation of the Sixth Amendment that this Court has
22 always appropriately articulated.

23 For this and other reasons stated in our
24 briefing, the Missouri versus Court of Appeals should be
25 reversed. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you counsel.

2 The case is submitted.

3 (Whereupon, at 12:00 p.m., the case in the
4 above-entitled matter was submitted.)

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